U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H-C-P-, INC.

DATE: OCT. 8, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of health care personnel, seeks to employ the Beneficiary as a nurse supervisor. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not demonstrate its continuing ability to pay the combined proffered wages of this and other relevant immigrant petitions that it has filed. On appeal, the Petitioner submits additional evidence and asserts that the Director failed to consider the overall magnitude of the Petitioner's business; that the Petitioner is not legally obligated to pay the wage until the Beneficiary becomes a permanent resident; and that the Petitioner must only show its ability to pay the proffered wages of all employed beneficiaries.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED PETITIONS FOR SCHEDULE A OCCUPATIONS

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.[1] If USCIS

[1] The priority date of the petition is July 31, 2017, the date the completed, signed petition was properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The regulation further provides that if a petitioner employs 100 or more workers, we may accept a statement from a financial officer of the petitioner which establishes its ability to pay the proffered wage. *Id.*

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. Here, the record does not contain evidence of any wages paid by the Petitioner to the Beneficiary from 2017 onward. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

Here, the labor certification states that the proffered wage of the offered position of nurse supervisor is $72,600 a year. With the petition, the Petitioner submitted a letter from its Director of Operations stating that the "company is financially capable of paying the services of [the Beneficiary] and all of our employees." However, the letter does not indicate that the Petitioner employs 100 or more workers, and the Petitioner indicated on the petition and labor certification that it has only 31 employees. Therefore, we cannot accept the letter as evidence of the Petitioner's ability to pay, and the Petitioner must submit its annual reports, federal tax returns, or audited financial statements from the priority date in 2017 onward. 8 C.F.R. § 204.5(g)(2).

In the Director's request for evidence (RFE), the Director requested the Petitioner's 2017 annual report, federal tax return, or audited financial statement. Instead, the Petitioner submitted its 2016 federal tax return which does not cover the 2017 priority date. In its RFE response, the Petitioner indicated that it was also submitting an audited financial statement for January – June 30, 2017, but the statement was not included in the RFE response. Further, the statement would not have covered the July 31, 2017 priority date. As indicated in the Director's denial decision, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage in 2017. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The Petitioner did not submit any regulatory-required evidence of its ability to pay on appeal. Therefore, the Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date and we will dismiss the appeal for this reason.

[2] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

On appeal, the Petitioner cites *Rizvi v. Dep't of Homeland Sec.*, 37 F.Supp. 3d at 870, for the proposition that USCIS may consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See also Matter of Sonegawa,* 12 I&N Dec. at 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the Petitioner was established in 2012 and indicated that it had 31 employees at the time the petition was filed in 2017. However, the Petitioner has not established its growth since its incorporation. Moreover, the record does not indicate the Petitioner's incurrence of uncharacteristic losses or expenses or its possession of an outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. Also, as noted by the Director in his decision, the Petitioner must demonstrate its ability to pay combined proffered wages of multiple petitions.

The Director reviewed the Petitioner's federal tax return for 2016, reflecting net income of $45,901 and net current assets of $266,579. The net current assets reflected on the return exceed the annual proffered wage. As the Director found, however, USCIS records indicate the Petitioner's filing of multiple Forms I-140, Immigrant Petitions for Alien Workers. Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[3]

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage

[3] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

deficiency.

In response to the Director's RFE, the Petitioner provided information for approximately 100 petitions that the Petitioner had filed through the date of the RFE response, identifying the beneficiary, case number, priority date, status, and offered wage of each petition. The Director found that the Petitioner had not established its ability to pay the combined proffered wages of the relevant beneficiaries through its 2016 net income or net current assets, and indicated that regulatory-required evidence of its ability to pay in 2017 was missing. On appeal, the Petitioner has not submitted any additional evidence regarding its other I-140 beneficiaries and it has not submitted its audited financial statement, federal tax return, or annual report for 2017. Thus, we cannot conclude that the Petitioner has established its ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries from 2017 onward based on the totality of its circumstances.

On appeal, the Petitioner also asserts that the Director did not take into account a federal district court decision in *Pooya Majdzadeh-Koohbanani v. Jaster-Quintanilla Dallas, LLP*, Civil Action No. 3:09-CV-1951-G-BK (N.D. Texas 2010), holding that a petitioner is not legally obligated to pay the prevailing wage until it actually employs the beneficiary. However, that holding is irrelevant in this case since the issue on appeal is not the Petitioner's obligation to pay the prevailing (or proffered) wage when it actually employs its I-140 beneficiaries, but its *ability* to do so as of the priority date, as required in 8 C.F.R. § 204.5(g)(2). As previously noted, the priority date for every Schedule A petition is the date the Petitioner files the labor certification and the I-140 petition with USCIS.

Finally, on appeal, the Petitioner asserts that the Director misapplied the doctrine in *Patel v. Johnson,* 2 F. Supp. 3d at 108, because that decision stated that the petitioner must demonstrate its ability to pay all *employed* beneficiaries, which only applies to about half of the Petitioner's I-140 beneficiaries. Here, the record does not establish who the Petitioner's employed beneficiaries are, their starting dates of employment, the wages paid to those beneficiaries, or the Petitioner's total proffered wage obligations to those beneficiaries. Moreover, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that the Petitioner's ability to pay the proffered wage for each of its I-140 beneficiaries begins when their respective labor certification applications are filed, not when they are employed by the Petitioner.

For the foregoing reasons, the Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date in 2017 onward. We will therefore affirm the Director's decision.

III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.[4]

[4] To meet Schedule A eligibility, a petitioner must submit a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. §§ 656.40 and 656.41. *See* 20 C.F.R. § 656.15(b)(1). In this case, the PWD states different job duties and requirements than the labor certification. In any future proceedings, the Petitioner must resolve these discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, the regulation at 20 C.F.R. § 656.17(h) states that an alternative requirement must

ORDER: The appeal is dismissed

Cite as *Matter of A-H-C-P-, Inc.*, ID# 4596578 (AAO Oct. 8, 2019)

be substantially equivalent to the primary requirement of the job opportunity in a labor certification application. Here, the labor certification's primary requirements are a master's degree in nursing plus 60 months of experience in the offered job. The labor certification permits a master's degree and no experience as an alternative to the primary requirements of a master's degree plus 60 months of experience. Thus, the labor certification's alternative job requirement is not substantially similar to the primary job requirements. Part H.14 of the labor certification also permits an applicant to qualify for the offered job with a bachelor's degree plus 60 months of experience, which is not substantially similar to the primary requirements of a master's degree plus 60 months of experience. In any future proceedings, the Petitioner must appropriately resolve these discrepancies. *Matter of Ho*, 19 I&N Dec. at 591-92.